

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD MOSZYK,

Plaintiff-Appellee/Cross-Appellant,

v

CITY OF BAY CITY, ROB ANDERSON, and
JAMES PALENICK,

Defendants-Appellants/Cross-
Appellees.

UNPUBLISHED

January 25, 2005

No. 252273

Bay Circuit Court

LC No. 01-003936-CZ

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

In this interlocutory appeal, defendants appeal by leave granted from the trial court's refusal to grant summary disposition as to plaintiff's wrongful discharge and defamation claims. Defendants also appeal from the trial court's refusal to give collateral estoppel effect to an arbitrator's award. Plaintiff appeals from the trial court's grant of summary disposition to defendants with regard to his Whistleblowers' Protection Act (WPA) claim. We affirm the dismissal of the WPA claim, albeit on different grounds, and reverse the refusal to dismiss plaintiff's remaining claims. We therefore find it unnecessary to address the collateral estoppel effect of the arbitrator's award.

Defendants employed plaintiff as a Building Code Enforcement Officer. Plaintiff was responsible for issuing building permits based on application of the relevant construction code. Pursuant to the July 31, 2001 update to Part 4 of Michigan's Construction Code, R 408.30401, the applicable building code was changed from the 1996 edition of the Building Officials and Code Administrators (BOCA) National Building Code to the 2000 International Building Code, effective on that date. In August 2001, plaintiff refused to issue a building permit pertaining to a construction project on the ground that it did not conform to the 2000 Code, although it apparently conformed to the 1996 BOCA Code. After consulting with Henry Green, the Executive Director of the State of Michigan Department of Consumer and Industry Services, Bureau of Construction Codes, defendants concluded that they had the authority to make an administrative decision to apply the 1996 BOCA Code under the circumstances. Defendants ordered plaintiff to apply the 1996 BOCA Code. Plaintiff refused, and defendants terminated plaintiff for insubordination. Plaintiff filed suit for a violation of the WPA on the basis of reports he made to defendants and to Green regarding his belief that applying the 1996 BOCA Code would be illegal. Plaintiff also alleged that his termination violated public policy and was

retaliation for refusing to obey an order to commit a crime. Finally, plaintiff alleged defamation on the basis of statements defendants made in the disciplinary notice terminating him and in a letter upholding his termination. Plaintiff was ultimately reinstated after binding arbitration, but without back pay.

First, the parties dispute whether the WPA constituted plaintiff's exclusive remedy. This relates to the parties' dispute on cross-appeal whether the trial court erred in granting summary disposition of plaintiff's WPA claim. We conclude that the trial court reached the correct result for the wrong reason and that the WPA is therefore not plaintiff's exclusive remedy.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to review de novo." *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

The remedies provided by the WPA, if applicable, are exclusive. *Dudewicz v Norris-Schmid, Inc.*, 443 Mich 68, 78-79; 503 NW2d 645 (1993). However, if the WPA does not provide a plaintiff with a remedy, it is *not* exclusive and does not operate to bar any other possible claims. *Driver v Hanley (After Remand)*, 226 Mich App 558, 566; 575 NW2d 31 (1997). A prima facie violation of the WPA requires a plaintiff to show "that (1) the plaintiff was engaged in protected activity as defined by the Whistleblowers' Protection Act, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge." *Shallal v Catholic Social Services of Wayne Co.*, 455 Mich 604, 610; 566 NW2d 571 (1997). There is no dispute that plaintiff was discharged.

A "public body" under the WPA is any body that is either created or funded by state or local authority, including a member of that body. *Manzo, supra* at 713-714. Although defendants themselves fit this definition, reporting an entity's violation of the law *to itself* would not serve the WPA's purpose of protecting the public by helping to ensure that higher authorities learn of violations so that they can protect the public. *Dickson v Oakland University*, 171 Mich App 68, 70-71; 429 NW2d 640 (1988), abrogated on other grounds and affirmed in relevant part in *Dudewicz, supra* at 76-77; n 4. However, Green is also a "public body" under this definition. Plaintiff transmitted two facsimiles to Green stating, in relevant part, "I am very uncomfortable with allowing this building to be constructed under the 1996 BOCA since that under the circumstances I believe it would be in violation of state law," "I believe Mr. Anderson is trying to force me to break the law," and "Mr. Anderson, for whatever personal or political reason, is by his actions, forcing me to break the laws of the State of Michigan, specifically PA230." These statements are clearly reports of "a suspected violation of law to a public body." *Shallal, supra* at 610. The trial court erred when it granted summary disposition on the ground that plaintiff did not engage in a protected activity.

However, "[t]he fact that a plaintiff engages in a 'protected activity' under the Whistleblowers' Protection Act does not immunize him from an otherwise legitimate, or unrelated, adverse job action." *West v General Motors Corp.*, 469 Mich 177, 187; 665 NW2d 468 (2003). The same facsimiles reference a memorandum stating that plaintiff had already been found in violation of "several Bay City rules and regulations, including insubordination, neglect of duty, and personal conduct." The facsimiles, and the record, further indicate that defendants

were *already* in the process of terminating plaintiff for reasons unrelated to the whistleblowing. Therefore, his WPA claim cannot be sustained, but also does not preclude other claims.

Next, defendants argue that the trial court erred when it refused to grant summary disposition as to plaintiff's remaining claims on the ground of governmental immunity. We agree.

A motion for summary disposition on the ground that a claim is barred, MCR 2.116(C)(7), requires that the court consider all documentary evidence from the parties and is reviewed *de novo* on appeal. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). It is undisputed that defendants are governmental agencies or agents thereof. Thus, whether they are subject to suit is controlled by the Governmental Immunity Act, MCL 691.1401 *et seq.* Under MCL 691.1407(1), defendant Bay City is immune from tort liability if it is "engaged in the exercise or discharge of a governmental function." The same absolute immunity applies under MCL 691.1707(5) to highest appointed executive officials "acting within the scope of [their] executive authority." Defendants, in a motion for summary disposition, contended that James Palenick, as city manager, and Rob Anderson, as director of development services, were immune as each was the highest appointed executive official at their level of government and both were acting within their executive authority. In order to survive a motion asserting governmental immunity, a plaintiff must allege facts justifying the application of an exception to this doctrine. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). At the trial court level and in response to defendants' motion for summary disposition, plaintiff did not challenge defendants' contention that defendants Palenick and Anderson were the highest appointed executives for immunity purposes, instead plaintiff argued they were acting outside their authority. On appeal, plaintiff for the first time challenges that Anderson is not the highest appointed executive official in the level of government in which he is employed. We cannot allow plaintiff to reap the benefit of this argument, however, when he failed to properly raise the argument in the trial court. If the issue had been challenged below the trial court could have analyzed the proper factors, *Grahovac v Munising Twp*, 263 Mich App 589, 593; 689 NW2d 498 (2004), to make a determination with regard to whether Anderson was the highest appointed executive official at his level of government, MCL 691.1407(5), for immunity purposes. Plaintiff has waived the issue. See, generally, *Spencer v Citizens Ins Co*, 239 Mich App 291, 300, 309-310; 608 NW2d 113 (2000); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Consequently, we review to determine if defendants are immune as highly ranked officials under MCL 691.1407(5).

Generally, "[t]here is no 'intentional tort' exception to governmental immunity." *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). Furthermore, there is no exception to governmental immunity for alleged defamation. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143-144; 560 NW2d 50 (1997). Intentional torts are not "per se outside the employee's authority and scope of employment." *Berlin v Superintendent of Public Instruction*, 181 Mich App 154, 162; 448 NW2d 764 (1989). High-level executive officials are absolutely immune from wrongful discharge torts where the official's job function includes "the authority to suspend and discharge employees of the department." *Meadows v City of Detroit*, 164 Mich App 418, 426-430; 418 NW2d 100 (1987).

Thus, the only potential exception to governmental immunity in the present case is for torts based on *ultra vires* activities, *Ross v Consumers Power Co*, 420 Mich 567, 634; 363 NW2d

641 (1984), or acts outside an official's executive authority. *American Transmissions, Inc, supra* at 141. Plaintiff argues extensively that defendants engaged in ultra vires acts when they ordered plaintiff to issue a building permit based on an application that complied with an older building code, but not with the newer one. Defendant Palenick was explicitly authorized to "appoint, discipline, suspend or terminate all city employees" under Section 5.2(c) of Part I of the Bay City Code of Ordinances, and defendant Anderson, as plaintiff's department director, was implicitly so authorized. Under the collective bargaining agreement, "no employee shall be disciplined or discharged without just cause," so defendants' documentation of their reasons for discharging plaintiff was not only authorized, it was apparently required. Even presuming defendants illegally ordered plaintiff to apply the 1996 BOCA Code, "ultra vires activity is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner." *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989). The agency was authorized to issue the building permits, and violation of the Construction Code Act provides no employment or anti-retaliation rights, unlike a violation of the WPA or the worker's compensation act. Therefore, defendants were within the scope of their authority when they terminated plaintiff and issued the disciplinary notice and the letter upholding plaintiff's dismissal. Accordingly, defendants enjoyed governmental immunity subject to no general exceptions and were immune from plaintiff's remaining claims. The trial court should have granted defendants' motion for summary disposition on the ground of governmental immunity.

Because all of plaintiff's claims must be dismissed, we need not address whether the arbitrator's award should be given collateral estoppel effect under the circumstances.

We affirm the dismissal of plaintiff's Whistleblowers' Protection Act claim on the ground that the right result was reached, albeit for the wrong reason. We reverse the trial court's refusal to dismiss plaintiff's remaining claims on the ground of governmental immunity and remand for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio